

# STATE OF ALASKA

## DEPARTMENT OF FISH AND GAME

### DIVISION OF HABITAT

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### MEMORANDUM

TO: Joe Donohue & Ben White  
DNR Division of Coastal & Ocean Management

DATE: August 7, 2008

FILE NO: AK 0803-05J

THRU:

SUBJECT: ABC List Revisions  
2<sup>nd</sup> Request for Additional Information

FROM: Jackie Timothy  
Southeast Regional Supervisor

TELEPHONE NO: 465-4275

The Alaska Department of Fish and Game (ADF&G), Division of Habitat, has reviewed the Department of Natural Resources Division of Coastal and Ocean Management's (DCOM) response to our August 1<sup>st</sup> Request for Additional Information (RFAI). The Division of Habitat appreciates DCOM's prompt response to the RFAI on the proposed ABC List revision. However, the additional information provided in DCOM's August 5<sup>th</sup> response does not address some primary information needs in the RFAI and is not adequate for us to complete our consistency review of the revised ABC List.

We understand the intent of the ABC List and fully support this revision. However, we also believe that the draft ABC List submitted for consistency review is in need of additional revision prior to completion of a consistency review and implementation by resource agencies. Items number 1, 2, and 3 listed in our RFAI included specific examples of inconsistencies and confusing language and clearly stated that similar issues were found throughout the ABC List. Our intent, while conducting this review, is to follow DCOM's July 29, 2008 email guidance "*While such responses [content and activity scope] may be of value during later phases of the ABC List revision, it is unlikely such non-consistency related response will be given credence in the current context of the ABC list revision consistency review process.*" The ABC List content and implementation has a significant impact on our Title 16 permitting responsibility. It is our understanding, based on recent discussions with DCOM staff, that the revised list will be implemented soon after a final consistency determination is issued. Because the focus of the existing review is on consistency with the ACMP, we will not have the opportunity to review the final ABC List that we will ultimately be responsible for implementing.

ADF&G does not have full-time staff dedicated to revising the ABC List. We are committed to actively participating in this consistency review, but we believe it is the responsibility of DCOM to review and revise activity descriptions and Standard Alternative Measures (SAMs) to bring them into conformance with the regulatory changes in the ACMP. We find it difficult to provide clear and effective consistency



comments, as requested, without additional information or clarification on the following items listed in our RFAI:

1. Consistency evaluation for the proposed SAMs in the revised ABC List:

DCOM's response states that a consistency evaluation was submitted for the entire ABC List, but the CPQ available online at the ABC List Working Page does not include a completed evaluation. ADF&G cannot adequately determine if a SAM is consistent with the statewide standards and offer suggestions on language or content if we do not understand the intent of the SAM or which standard the SAM is meant to create consistency with. Many of the SAMs reference the general habitat standard (11 AAC 112.300) rather than referencing the standard for a specific habitat. ADF&G is requesting that DCOM review the proposed SAMs in each GCD and remove or revise those which cannot be tied to a specific habitat standard or may be duplicative of resource agency authorities. ADF&G is also requesting a reference follow each SAM that is necessary to achieve consistency with the ACMP (i.e. 11 AAC 112.300(b)(2)(B)).

DCOM's response to ADF&G's concerns about SAMs which are duplicative of our Title 16 authority states that these SAMs are intended to *"allow ADF&G the ability to carry consistency related stipulations on permits that are issued for an activity"* per 11 AAC 110.050(e). We do not carry consistency related stipulations on our permits. We rely on the A and B List determinations, as well as the coordinated consistency review and single agency review processes, to provide consistency with the ACMP. 11 AAC 110.050(e) states that after a final consistency determination is issued, *"additional stipulations not necessary to achieve consistency...may be added under an agency's own statutory or regulatory authority."* Based on this, it is unclear to ADF&G why DCOM has tried to develop a SAM that *"allows permits to be issued in the coastal zone with stipulations."* The stipulations listed on our Title 16 permits are directly related to our statutory authority and do not address a project's consistency with the ACMP Habitats standard.

2. Revised GCD activity descriptions:

DCOM has acknowledged that there are conditions in some of the revised GCD activity descriptions that require revision or clarification and the examples we provided are the type of comments anticipated during the review process, yet DCOM has also indicated that content related issues with the ABC List will not be addressed until later phases of the review process. ADF&G requests that DCOM review and revise or remove conditions listed in the activity description of each GCD which may be confusing or duplicative of our Title 16 authorities. This revision is necessary before we can comment on consistency with the ACMP.

In addition, ADF&G requests clarification on DCOM's assertion that removing all of the conditions which duplicate our regulatory authority would result in ADF&G conducting single agency reviews for each project. It is our understanding that, pursuant to AS 46.40.096, the B List determinations must be *"as broad as possible so as to minimize the number of projects that must undergo a individualized consistency review."* By including very specific conditions that must be adhered to and are also under our authority, DCOM may increase, rather than decrease, the number of projects that are subject to individual consistency review because the site-specific conditions differ from the



GCD activity description. GCD-305 includes a statement that would address this issue in some cases and should be included on all GCDs for which a Fish Habitat Permit applies: *"Under its own authorities (AS 16.05), DFG may modify the conditions listed above or add additional conditions (ex. timing windows) based on site-specific concerns (soil conditions, stream morphology, etc.) provided that the modified or additional conditions meet or exceed the minimum requirements of this GCD."*

3. Consistency between activity descriptions and SAMs:

The response provided by DCOM acknowledges that there may be inconsistencies between the activity descriptions and the SAMs that were overlooked during the revision process. As stated above, the ABC List content and implementation has a significant impact on our Title 16 permitting responsibility and focusing on consistency with the ACMP for this review does not allow for resource agency input regarding the final content of the ABC List. ADF&G requests that DCOM review and revise the ABC List to remove these inconsistencies. This revision is necessary before we can comment on consistency with the ACMP.

In addition to the original examples we provided, another example that illustrates this point is:

- Example: GCD-403, Culvert and Bridge Installation states in the activity description that *"Stream bank vegetation or the vegetated mat within the riparian management area shall not be disturbed."* This conflicts with SAM 3. Installation and maintenance of culverts and bridges usually requires some disturbance to vegetation to allow work on the structures. ADF&G suggests changing this condition to the original language used in GCD-7: *"Alteration of streambanks shall be minimized and restricted to that necessary for the [activity]. Disturbed streambanks shall be immediately stabilized to prevent erosion and sedimentation of the stream."*

4. Coordination Process:

DCOM's response to our RFAI cites 11 AAC 110.700(c) in reference to the draft procedural language requiring that DCOM makes the determination on the use of a GCD. It is our interpretation that this only applies to projects that include activities subject to A or B List determinations *in addition to* activities which are not subject to A or B List determinations and must undergo a coordinated consistency review. In this case, it is up to DCOM to determine whether or not the activities subject to the A or B List may be excluded from the scope of the consistency review. ADF&G refers to 11 AAC 110.700(b) to guide our review process for the majority of permit reviews we conduct. It clearly states that "if all activities of a project are subject to a general or nationwide permit, a categorically consistent determination, or generally consistent determination...the project is not subject to additional consistency review" and does not include language requiring additional coordination with DCOM regarding the applicability of a GCD. Since DCOM did not provide any details on the proposed coordination process to be implemented under the revised ABC List, it may be beneficial to meet and discuss the existing regulations and how they relate to implementation of the ABC List. ADF&G agrees that the focus should be on expediting the review process and we are currently involved in discussions with DCOM on this subject. We request that the revised ABC List is not adopted into regulation until the implementation process has been reviewed and accepted by resource agencies and other review participants.

5. Requirements for completing the CPQ and Evaluation:

ADF&G understands that the CPQ is a useful tool for evaluating a project and ensuring that all the necessary permits have been applied for and the proper resource agencies have been notified. We do, however, believe that activities which fall within a GCD should not require a consistency evaluation as they have already been found to be consistent with the ACMP. For those GCDs which do not require a CPQ and evaluation, the requirements for submitting a CPQ only when more than one permit or GCD is required seems to contradict the idea of simplifying the process for activities which have already been determined to have minor or temporary impacts to coastal resources. ADF&G would like to discuss this subject in greater detail with DCOM. The revised ABC List procedures section should be revised to simplify the process for implementing the GCDs.

ADF&G invites DCOM to meet and discuss the requests outlined above regarding the ABC List revisions. We look forward to an open dialogue and continued coordination between our agencies. If you have any questions regarding this request for additional information, please contact Megan Marie at (907) 267-2446.

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